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Citation for published version:

Laurie, G, *Consent to medical treatment: Scotland hammers home the final nail in the coffin of Bolam* , 2015, Web publication/site, Motley Coat: A Blog of the Mason Institute.
<<http://masoninstitute.blogspot.co.uk/2015/06/consent-to-medical-treatment-scotland.html>>

Link:

[Link to publication record in Edinburgh Research Explorer](#)

Document Version:

Publisher's PDF, also known as Version of record

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Tuesday, 2 June 2015

Consent to medical treatment: Scotland hammers home the final nail in the coffin of Bolam



By **Graeme Laurie**

Should a doctor inform a pregnant woman of a 9-10% risk of harm to her baby during delivery? Is it part of the doctor's duty to do so, no questions asked? While many readers might think that the answers to these questions are self-evident, this has by no means been clear as a matter of law throughout the United Kingdom for the last 30 years. Indeed a 'No' response might have been upheld by the courts if the medical profession thought it acceptable not to inform. This has now changed with the recent decision of the

Supreme Court in *Montgomery v Lanarkshire Health Board*, which has confirmed, categorically, that the duty of care that doctors owe to patients when advising them about their care is not to be determined by reference to responsible medical practice, or the so-called Bolam test.

This position had been laid down in 1985 by the then House of Lords in *Sidaway v Board of Governors of the Bethlem Royal Hospital*. That case established a line of precedent that treated information disclosure cases – i.e. what patients should be told about treatment options – by reference to what the medical profession decided was appropriate. Tellingly, in *Sidaway* the term 'patient autonomy' was never even used. The lone voice in the judgment was Lord Scarman who referenced the importance of self-determination and took as his fundamental premise "...the patient's right to make his own decision, which may be seen as a basic human right protected by the common law." [p. 882]. In contrast, all other judges, in one form or another, endorsed a position of medical paternalism that has held sway ever since.

In 2015, however, the Supreme Court has roundly rejected the paternalistic position in *Sidaway* as "unsatisfactory"; indeed, it has gone further in condemning the suggestion therein that a doctor need only answer direct questions as "profoundly unsatisfactory". Rather, it has confirmed and reiterated Lord Scarman's position all those years ago as one that now correctly reflects the appropriate legal standard of care that patients can expect from their doctors. The grip of the professionally oriented Bolam test has been released.

While it is true that the tectonic plates of precedent have been moving in this direction in recent years this has largely been driven by the lower courts in England and Wales. *Montgomery*, on appeal from the Inner House of the Court of Session in Scotland, represents the most authoritative and damning rejection of the Bolam test to consent to medical treatment across the UK. Subject to refinements by the Court of Appeal in *Pearce v United Bristol Healthcare NHS Trust* and the High Court of Australia in *Rogers v Whitaker*, Lord Scarman's position now prevails. The Supreme Court expressed it thus:

"An adult person of sound mind is entitled to decide which, if any, of the available forms of treatment to undergo, and her consent must be obtained before treatment interfering with her bodily integrity is undertaken. The doctor is therefore under a duty to take reasonable care to ensure that the patient is aware of any material risks involved in any recommended treatment,

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and of any reasonable alternative or variant treatments. The test of materiality is whether, in the circumstances of the particular case, a reasonable person in the patient's position would be likely to attach significance to the risk, or the doctor is or should reasonably be aware that the particular patient would be likely to attach significance to it." [para 87]

In doing so, the Court drew the all important distinction between matters exclusively within the purview of professional skills and expertise, such as assessing possible investigatory or treatment options, and the duty to discuss with the patient any recommended interventions, the available alternatives, and the risks of injury that might be involved. It is this last duty that now characterises the information disclosure obligation of health care professionals to patients as a matter of the promotion of the own autonomy. Among other things, it involves:

- The duty to take reasonable care to inform the patient of material risks inherent in any treatment.
- The duty to avoid exposing the patient to a risk that she or he would otherwise avoid.
- The duty to support the patient in deciding whether or not to incur that risk.


As the court said, the entitlement to decide whether – or not – to run a risk does not depend exclusively on medical matters. Moreover, the determination of the appropriate standard of care from the medical profession, and the nature and extent of patients' rights, now rests determinedly with the courts.

The Supreme Court clarified three more matters:

1. assessment of materiality of risk should not be seen as a pure percentage exercise – it involves a far wider range of considerations than statistical probability;
2. the discharge of the above duties necessitates effective dialogue between doctor and patient, ensuring the patient is in a position to make a meaningful and genuine exercise of autonomy;
3. while a therapeutic exception remains – i.e. when a health care professional reasonably assesses that it would be detrimental to the health of a patient to disclose, this exists logically subordinate to the autonomy rule and cannot subvert that rule "...to prevent the patient from making an informed choice where she is liable to make a choice which the doctor considers to be contrary to her best interests." [para 91]

In many ways this decision is of little surprise in light of the hue given to case law by the Human Rights Act 1998 and also the growing professional guidance that supports a dialogistic therapeutic partnership approach to the doctor/patient relationship (GMC, 2013). Nonetheless, the end of the Bolam era in consent cases is something to be marked. It is telling, too, that the Court explicitly noted that the likely consequent unpredictability of litigation is more than acceptable because "...respect for the dignity of patients requires no less." [para 93]

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